UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ADRIAN SCHOOLCRAFT,

Plaintiff,

10 Civ. 6005 (RWS)

- against -

OPINION

CITY OF NEW YORK, et al.,

Defendants.

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A P P E A R A N C E S:

Attorneys for the Plaintiff

THE LAW OFFICES OF JON L. NORINSBERG, ESQ.
225 Broadway, Suite 2700
New York, NY 10007
By: Jon L. Norinsberg, Esq.

COHEN & FITCH LLP
225 Broadway, Suite 2700
New York, NY 10007
By: Joshua Paul Fitch, Esq.
Gerald M. Cohen, Esq.

Attorneys for the City Defendants & Non-Party Councilman Peter Vallone, Jr.

MICHAEL A. CARDOZO
CORPORATION COUNSEL OF THE CITY OF NEW YORK
100 Church Street
New York, NY 10007
By: Suzanna Hallie Publicker, Esq.
Maxwell Douglas Leighton, Esq.
Donna Anne Canfield, Esq.
William Solomon Jacob Fraenkel, Esq.

**Sweet, D.J.**

There are currently two motions pending before the Court. Plaintiff Adrian Schoolcraft ("Schoolcraft," or the "Plaintiff") has requested leave to amend his complaint to add a First Amendment retaliation claim under 42 U.S.C. § 1983 and to substitute Lieutenant William Gough for Lieutenant Joseph Goff who was incorrectly named in the complaint. Additionally, non-party Councilman Peter Vallone, Jr. has requested that the Court quash the subpoena served upon him by Plaintiff seeking, among other things, records of complaints regarding the alleged downgrading of crime reports and documents reflecting the alleged failure of the New York City Police Department (the "NYPD") to report crime statistics and the existence of an alleged arrest/summons quota policy. Based on the facts and conclusions set forth below, Plaintiff's motion to amend the complaint is granted in part and denied in part, and Councilman Vallone's motion to quash is denied.

## Facts & Prior Proceedings

The facts of the case are detailed in this Court's opinion dated May 6 which granted in part and denied in part Defendant Jamaica Hospital Medical Center's motion to dismiss.

See Schoolcraft v. City of New York, No. 10 Civ. 6005(RWS), 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011). Familiarity with those facts is assumed.

On April 25, 2012, Plaintiff wrote to the Court requesting leave to amend the complaint to add a First Amendment retaliation claim under 42 U.S.C. § 1983. The letter was treated as a motion and a date set for argument. After receiving several letters from both Plaintiff and counsel for Defendants City of New York, the NYPD, and the individual police officers (the "City Defendants"), the motion was heard and marked fully submitted on May 9, 2012.

On May 11, 2012, non-party Councilman Peter Vallone, Jr., represented by the City Defendants' counsel, wrote to the Court requesting that Plaintiff's subpoena be quashed. The letter was treated as a motion and a date set for argument. After receiving correspondence from both Plaintiff and Councilman Vallone, the motion was heard and marked fully submitted on May 23, 2012.

**The Applicable Standards**

**A. Standard Applicable To Plaintiff's Motion To Amend**

Pursuant to Fed. R. Civ. P. 15(a)(2), leave to amend a complaint shall be given "freely" when "justice so requires." "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Williams v. Citigroup Inc., 659 F.3d 208, 213 (2d Cir. 2011) (quoting Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). However, "[a] district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007); see also AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A., 626 F.3d 699, 726 (2d Cir. 2010) ("Leave to amend may be denied on grounds of futility if the proposed amendment fails to state a legally cognizable claim or fails to raise triable issues of fact.").

**B. Standard Applicable To Councilman Vallone's Motion To Quash**

Fed. R. Civ. 26(b)(1) governs the scope of discovery and permits discovery of materials that are relevant to "any

party's claim or defense . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). "This obviously broad rule is liberally construed." Daval Steel Prods. V. M/V Fakredine, 951 F.2d 1357, 1367 (2d Cir. 1991). "[T]he overriding policy is one of disclosure of relevant information in the interest of promoting the search for truth in a federal question case." Burke v. N.Y. City Police Dep't, 115 F.R.D. 220, 225 (S.D.N.Y. 1987); see also Condit v. Dunne, 225 F.R.D. 100, 105 (S.D.N.Y. 2004) ("Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept.").

"The party issuing the subpoena must demonstrate that the information sought is relevant and material to the allegations and claims at issue in the proceedings." Night Hawk Ltd. v. Briarpatch Ltd, LP, No. 03 Civ. 1382, 2003 WL 23018833, at *8 (S.D.N.Y. Dec. 23, 2003) (citing Salvatore Studios Int'l v. Mako's Inc., No. 01 Civ. 4430, 2001 WL 913945, at *1 (S.D.N.Y. Aug. 14, 2001) ("Rule 26(b)(1) of the Federal Rules of Civil Procedure restricts discovery to matters relevant to the claims and defenses of the parties. Here, the burden is on Mako's [who issued the subpoena] to demonstrate relevance.");

accord Bridgeport Music Inc. v. UMG Recordings, Inc., No. 05 Civ. 6430, 2007 WL 4410405, at *2 (S.D.N.Y. Dec. 17, 2007); Quotron Sys., Inc. v. Automatic Data Processing, Inc., 141 F.R.D. 37, 41 (S.D.N.Y. 1992); Culligan v. Yamaha Motor Corp., 110 F.R.D. 122, 125 (S.D.N.Y. 1986). Once the party issuing the subpoena has demonstrated the relevance of the requested documents, the party seeking to quash the subpoena bears the burden of demonstrating that the subpoena is overbroad, duplicative, or unduly burdensome. Sea Tow Int'l, Inc. v. Pontin, 246 F.R.D. 421, 424 (E.D.N.Y. 2007) ("The burden of persuasion in a motion to quash a subpoena . . . is borne by the movant.") (quoting Jones v. Hirschfeld, 219 F.R.D. 71, 74-75 (S.D.N.Y. 2003). The determination of whether a subpoena is unduly burdensome turns, in part, on why the requested material is relevant. United States v. Int'l Bus. Mach. Corp., 83 F.R.D. 97, 104 (S.D.N.Y. 1979) (a court evaluating a motion to quash considers "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed."); Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 50 (S.D.N.Y. 1996) ("To the extent a subpoena sweepingly pursues material with little apparent or likely relevance to the subject matter it runs the

greater risk of being found overbroad and unreasonable.").

**Plaintiff's Motion To Amend The Complaint Is Granted In Part And Denied In Part**

Plaintiff has requested leave to amend the complaint to add a First Amendment retaliation claim under 42 U.S.C. § 1983. Plaintiff also requests that he be permitted to substitute Lieutenant William Gough for Lieutenant Joseph Goff who was incorrectly named in the original complaint. The request to substitute Lieutenant Gough as a defendant is made with the consent of all parties except the City Defendants. During discovery, the City Defendants provided Plaintiff with the UF 49 (Unusual Occurrence Report) from October 31, 2009, which indicated that Lieutenant William Gough was present at Plaintiff's home during the events that gave rise to this lawsuit. Lieutenant Joseph Goff was incorrectly named as a defendant on account of the similarity between his name and that of Lieutenant Gough.

As noted above, in deciding whether to grant leave to amend, district courts consider whether the party seeking the amendment has not unduly delayed, whether that party is acting in good faith, whether the opposing party will be prejudiced,

and whether the amendment will be futile. See Foman, 371 U.S. at 182. All of these considerations favor granting Plaintiff's motion to substitute Lieutenant William Gough for Lieutenant Joseph Goff. There is no indication that Plaintiff's request is untimely or that Plaintiff is in any way acting in bad faith. The City Defendants have raised no objections on the basis of prejudice or futility. Accordingly, Plaintiff's request to substitute Lieutenant Gough for Lieutenant Goff is granted.

With respect to Plaintiff's request to add a First Amendment retaliation claim, Plaintiff's proposed amended complaint alleges that "[t]he actions taken by the NYPD defendants on the night of October 31, 2009 violated plaintiff's First Amendment right[s] as he was specifically preparing to disclose information to the public at large that the largest Police Department in the United States had committed serious and continuous breaches of the public trust and a fraud upon the public. Plaintiff's aforementioned unjustified arrest and detention was not authorized by law and instead constituted a prior restraint on a plaintiff's speech, which is presumptively unconstitutional and which constituted an abuse of power and a fraud upon the public." Compl. ¶¶ 255, 256. The proposed amended complaint also alleges that,

> NYPD defendants unconstitutionally imposed this prior restraint on plaintiff's speech in an effort by defendants to silence, intimidate, threaten and prevent plaintiff from disclosing the evidence of corruption and misconduct plaintiff had been collecting and documenting to the media and public at large.
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> Specifically, NYPD defendants illegally seized plaintiff's draft report to Commissioner Raymond Kelly detailing the police corruption and misconduct he had been documenting and collecting in an effort to prevent said material from being disclosed to anyone.
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> Additionally, NYPD defendants also seized plaintiff's personal notes and other effects regarding his complaints against the 81st precinct in an effort to prevent said material from being disclosed to anyone and especially members of the news media and victims of the aforementioned corruption.

Compl. ¶¶ 259, 260, 261. Plaintiff contends that prior to the events of October 31, 2009, Plaintiff had made numerous complaints to supervisory personnel within the NYPD and to internal investigative agencies regarding the enforcement and establishment of an arrest and summons quota. Plaintiff also alleges that he made allegations that commanding officers had manipulated crime statistics and civilian complaints so as to avoid classification of these complaints as "major crimes" for purposes of reporting crime statistics to the public. According to Plaintiff, these allegations were substantiated by a report produced by the NYPD's Quality Assurance Division, which found

that civilian complaints were being falsified by the NYPD. Plaintiff contends that following the disclosure of the Quality Assurance Division findings, the merit of Plaintiff's First Amendment retaliation claim became clear, as the events of October 31, 2009 and subsequent harassment was done directly in retaliation against Plaintiff because he sought to exercise his First Amendment right to speak out regarding the NYPD's breach of the public trust.

"In order to establish a First Amendment retaliation claim, plaintiffs must prove that: (1) they engaged in constitutionally protected speech because they spoke as citizens on a matter of public concern; (2) they suffered an adverse employment action; and (3) the speech was a 'motivating factor' in the adverse employment decision." Skehan v. Vill. of Mamaroneck, 465 F.3d 96, 106 (2d Cir. 2006), abrogated on other grounds by Appel v. Spiridon, 531 F.3d 138, 139-40 (2d Cir. 2008). The City Defendants contend that Plaintiff's request to amend his complaint should be denied as futile because the Supreme Court's holding in Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006) precludes Plaintiff's First Amendment claim.

When a citizen enters government service, he or she "by necessity must accept certain limitations on his or her freedom." Garcetti, 547 U.S. at 418. This includes a limitation on the protections afforded a government employee's speech. A government employee can invoke First Amendment protections for his speech only when he speaks "as a citizen addressing matters of public concern." Garcetti, 547 U.S. at 417. As such, in order to invoke First Amendment protections, a government official, such as a police officer, must demonstrate not only that the subject of his speech was a matter of public concern, but also that when he spoke on the subject, he spoke "as a citizen" rather than "as a government employee." Id. at 420-22.

"To constitute speech on a matter of public concern, an employee's expression must 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" Jackler v. Byrne, 658 F.3d 225, 236 (2d Cir. 2011) (citing Connick v. Myers, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). "Exposure of official misconduct, especially within the police department, is generally of great consequence to the public." Jackler, 658 F.3d at 236 (citing Branton v. City of Dallas, 272 F.3d 730, 740 (5th Cir. 2001);

Garcetti, 547 U.S. at 425 ("governmental . . . misconduct is a matter of considerable significance"). According to the facts Plaintiff alleges, Plaintiff's speech concerned an allegedly unconstitutional arrest and summons quota policy and a misreporting of crime statistics. "Where a public employee's speech concerns a government agency's breach of the public trust, as it does here, the speech relates to more than a mere personal grievance and therefore falls outside Garcetti's restrictions." Anderson v. State of N.Y. Office of Court Admin., 614 F. Supp. 2d 404, 428 (S.D.N.Y. 2009). As such, Plaintiff's speech concerned a matter of public concern.

However, in addition to demonstrating the speech to involve a matter of public concern, Plaintiff must establish that he was speaking "as a citizen" rather than "as a government employee." Garcetti, 547 U.S. at 420-22. If the employee did not speak as a citizen, the speech is not protected by the First Amendment. Jackler, 658 F.3d at 237 (citing Connick, 461 U.S. at 146; Garcetti, 547 U.S. at 423 ("When . . . the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny.")). In Weintraub v. Board of Education, the Second Circuit explained that the inquiry into whether a public employee spoke pursuant to his official duties

is both objective and "a practical one." 593 F.3d 196, 202 (2d Cir.), cert. denied, 131 S.Ct. 444, 178 L.Ed.2d 344 (2010). "[U]nder the First Amendment, speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer." Id. at 203. "Since Garcetti, some lower courts have developed more guidelines for determining whether speech is made pursuant to a public employee's official duties. Although none of the following factors are dispositive, they may be considered by the Court: 'the plaintiff's job description;' the persons to whom the speech was directed; and 'whether the speech resulted from special knowledge gained through the plaintiff's employment.'" Frisenda v. Inc. Vill. of Malverne, 775 F. Supp. 2d 486, 506 (E.D.N.Y. 2011) (citing Caraccilo v. Vill. of Seneca Falls, 582 F. Supp. 2d 390, 405 (W.D.N.Y. 2008)). "Although there is no simple checklist or formula by which to determine whether the employee was speaking as a private citizen or as a public employee . . . 'the cases distinguish between speech that is the kind of activity engaged in by citizens who do not work for the government and activities undertaken in the course of performing one's job.'" Caraccilo, 582 F. Supp. 2d at 410 (quoting Davis v. McKinney, 518 F.3d 304, 312-13 (5th Cir. 2008)).

Under Garcetti, if the speech at issue is not required by the government employee's job duties, it is protected. See, e.g., Sassi v. Lou-Gould, No. 05 Civ. 10450(CLB), 2007 WL 635579, at *3 (S.D.N.Y. Feb. 27, 2007) ("Unlike the plaintiff i[n] Garcetti, whose job it was to write the communications which he claimed constituted protected speech, Chief Sassi had no such duty to write public letters to the City Council 'as a resident taxpayer.'"). The fact that a plaintiff's speech is related to his or her job does not automatically result in a loss of First Amendment protection. See Jackson v. Jimino, 506 F. Supp. 2d 105, 109 (N.D.N.Y. 2007) ("If we were to adopt Defendants' argument, we would inextricably have [to] find that Garcetti dictates a bright-line rule - an all or nothing determination - on an employee's speech even if it tangentially concerns the official's employment. We find that Garcetti does not stand for that proposition."). Thus, in evaluating whether Plaintiff was speaking as "as a citizen" rather than "as a government employee," the issue is whether the alleged speech is required by Plaintiff's job duties, and the fact that speech is related to the employee's occupation does not necessary preclude First Amendment protection.

As described in Plaintiff's proposed amended complaint, the speech at issue in this case concerns Plaintiff's intention to disclose the alleged corrupt summons issuance and arrest policies of the NYPD to the news media and members of the public. Plaintiff contends that his unjustified arrest and detention constituted a prior restraint on his speech, that Plaintiff's confinement was retaliation against him for gathering and documenting the corrupt summons and arrest policy employed by the NYPD and that Plaintiff's confinement was also done in retaliation for Plaintiff's efforts to exercise his First Amendment rights and inform the public of the police misconduct he witnessed.

Several factors indicate that Plaintiff's speech was pursuant to his position as a police officer. NYPD Patrol Guide § 207-21 states that "[a]ll members of the service have an absolute duty to report any corruption or other misconduct, or allegation of corruption or other misconduct, of which they become aware." Additionally, in the case of Matthews v. City of New York, No. 12 Civ. 1354(BSJ), 2012 U.S. Dist. LEXIS 53213 (S.D.N.Y. Apr. 12, 2012), the Honorable Barbara S. Jones addressed an issue similar to that confronting the Court in the present action. In Matthews, a police officer plaintiff alleged

that he was retaliated against for complaining about an illegal quota system in the 42nd Precinct. Police Officer Matthews filed suit under 42 U.S.C. § 1983 alleging violation of his First Amendment rights, and the City of New York moved to dismiss on grounds that Police Officer Matthews did not engage in constitutionally protected speech. Recognizing that Police Officer Matthews' speech involved a matter of public concern, the only question in Matthews concerned whether the plaintiff spoke as a citizen rather than an employee. Judge Jones held that Police Officer Matthews did not speak as a private citizen:

> Here, as in Weintraub, Matthews' complaints to his supervisors are consistent with his core duties as a police officer, to legally and ethically search, arrest, issue summonses, and—in general—police. Here, like the plaintiff in Weintraub, Matthews attempts to carve out his speech for First Amendment protection by claiming that he was not technically "required" to initiate grievance procedures and/or expose the problem as part of his employment duties. The Court rejects that argument as one that elevates form over substance. As Weintraub observed, "[t]he objective inquiry into whether a public employee spoke 'pursuant to' his or her official duties is a 'practical one' [and] [t]he Garcetti Court cautioned courts against construing a government employee's official duties too narrowly." 593 F.3d at 202. By that standard, the Court concludes that Matthews' concerns about illegal policing practices are "part-and-parcel" of his ability to "properly execute his duties." Id. at 203. As he himself describes it, the quota system caused "unjustifiable stops, arrests, and summonses because police officers felt forced to abandon their discretion in order to meet their numbers." [citation to complaint omitted]. And, to the extent Matthews defines his speech as complaints about precinct mismanagement and communication, that speech is not protected under well

> established Supreme Court precedent. See Connick v. Myers, 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); see also Frisenda v. Inc. Vill. of Malverne, 775 F. Supp. 2d 486 (E.D.N.Y. 2011) (finding that an employee's memorandum concerning communications problems with officers investigating and responding to emergency situations was not protected speech).

Matthews, 2012 U.S. Dist. LEXIS 53213, at *7-8.

In addition to the NYPD Patrol Guide and the Matthews decision, the City Defendants also highlight several other cases suggesting Plaintiff's speech to have been pursuant to his official duties and therefore not entitled to First Amendment protection. The plaintiff in the Second Circuit case of Weintraub v. Board of Education was a teacher who complained about the school administration's failure to discipline students, and the Second Circuit held that the plaintiff's complaints were not protected speech because the plaintiff was speaking as an employee and not a citizen since the complaints were "part-and-parcel of his concerns" about his ability to "properly execute his duties" as a public school teacher. Weintraub, 593 F.3d at 203. In Frisenda v. Incorporated Village of Malverne, the Eastern District of New York confronted a case involving a police lieutenant claiming to have been retaliated against for engaging in protected speech. One of the alleged

speech acts in Frisenda was the plaintiff's authorship of a memorandum submitted to the police chief highlighting certain procedures that the plaintiff considered dangerous. Frisenda, 775 F. Supp. 2d at 504. In holding that the plaintiff's speech was not protected, the Court noted that the speech's subject matter related to the plaintiff's employment as a police officer, that the speech was only made internally within the police department and that the matters the speech concerned "were things that [plaintiff] came to learn as part of his duties and responsibilities in the [police department.]" Id. at 507. Finally, in Brady v. County of Suffolk, 657 F. Supp. 2d 331 (E.D.N.Y. 2009), the plaintiff was a Suffolk County police officer who wrote a memorandum allegedly expressing concern for the public's safety as a result of the county's enforcement policies. Id. at 336-37. The Court held that the memorandum was not protected speech, noting that more than simply being "related" to plaintiff's employment, the memorandum touched on "one of plaintiff's core job functions [which] was to enforce the [Vehicle Traffic Law] by issuing traffic summonses, and his statements solely concerned the enforcement of the VTL through issuances of traffic summonses to off-duty law enforcement personnel and PBA cardholders." Id. at 344. The City Defendants contend that, just as in Garcetti, Matthews,

Weintraub, Frisenda and Brady, Plaintiff's speech in this action is not protected under the First Amendment.

The City Defendants also challenge Plaintiff's allegation that "he was specifically preparing to disclose information to the public at large," Compl. ¶ 255, and that Plaintiff's arrest and detention constituted "a prior restraint on plaintiff's speech," Compl. ¶ 256. According to the City Defendants, these allegations in the proposed amended complaint fail to satisfy the plausibility pleading standard promulgated by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Evaluating whether the speech at issue in this action was made "pursuant to" Plaintiff's official duties as a government employee presents a difficult problem. On the one hand, Plaintiff engaged in extraordinary efforts: Plaintiff's complaint alleges that Plaintiff objected to the summons and arrest policy to his supervisors, reached out to a former NYPD detective who had assisted Frank Serpico in the 1970s in uncovering corruption in the NYPD, lodged a complaint with the Internal Affairs Bureau, reported his findings to the Quality Assurance Division, prepared a report for Commissioner Kelly

documenting the police misconduct and, ultimately, prepared to disclose information to the public. However, on the other hand, the NYPD Patrol Guide illustrates the reporting of police misconduct to be squarely within Plaintiff's job responsibilities. Judge Jones' denial of a First Amendment retaliation claim in the recent case of Matthews v. City of New York also concluded that Garcetti and its Second Circuit progeny preclude Plaintiff's First Amendment claim. Plaintiff's complaint alleges only that Plaintiff "was specifically preparing to disclose information to the public at large," not that Plaintiff actually disclosed any information to the press. As such, Plaintiff's speech, which was confined to his supervisors, the Internal Affairs Bureau and the Quality Assurance Division, is analogous to the internal speech at issue in Garcetti, Matthews, Weintraub, Frisenda and Brady.[1]

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[1] See Garcetti, 547 U.S. at 414-15 (speech involved a deputy district attorney's memorandum to his supervisors expressing his concerns regarding an affidavit and his recommendation that a case be dismissed); Matthews, 2012 U.S. Dist. LEXIS 53213, at *2 (speech involved a police officer speaking out to his commanding officers regarding a quota system); Weintraub, 593 F.3d at 198-99 (speech involved a teacher's complaints to his assistant principal, his comments to fellow teachers and a grievance filed with his union representative concerning the school administration's failure to take action regarding a classroom incident); Frisenda, 775 F. Supp. 2d at 493 (speech involved a police officer's membership and participation in the Police Benevolent Association, his involvement as a witness in a federal lawsuit filed by another officer alleging retaliation and a memo written to the Village Board and Chief of Police

Plaintiff's allegations concerning his intention to go public, coupled with his duties as stated in the NYPD Patrol Guide and the fact that government officials' internal complaints have been previously deemed insufficient to qualify for First Amendment protection, fail to nudge Plaintiff's claims over the line created by Garcetti from speech made by a government employee pursuant to his duties to speech made by a private citizen. Accordingly, Plaintiff's request to amend his complaint to include a First Amendment retaliation claim is denied.

Plaintiff, citing the Second Circuit's decision in Jackler v. Byrne, contends that addressing the unconstitutional police practices was not part of his job duties and, as such, his comments concerning these practices are entitled to First Amendment protection. Plaintiff cites the following language from the Jackler opinion in support of his contention:

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regarding what plaintiff believed was a failure by members of the police department to follow procedure in responding to a particular emergency situation); Brady, 657 F. Supp. 2d at 333-34 (speech involved a police officer complaining to his supervisors about the defendants' alleged practice of not issuing tickets for traffic violations to off-duty law enforcement officials and individuals in possession of PBA membership cards).

> [I]t is clear that the First Amendment protects the rights of a citizen to refuse to retract a report to the police that he believes is true, to refuse to make a statement that he believes is false, and to refuse to engage in unlawful conduct by filing a false report with the police. We conclude that Jackler's refusal to comply with orders to retract his truthful Report and file one that was false has a clear civilian analogue and that Jackler was not simply doing his job in refusing to obey those orders from the department's top administrative officers and the chief of police.

Jackler, 658 F.3d at 241-42. However, Judge Jones' opinion in Matthews squarely addressed this argument, noting: "The Jackler Court was careful in characterizing the speech at issue there, defining it as Jackler's refusal to follow his superiors' instructions to retract his truthful report and to speak falsely, not as the filing of the Report; the latter would have been an act of speech that was simply pursuant to Jackler's duties. The refusal to retract a true statement and issue a false one, however, was only related to his job duties." Matthews, 2012 U.S. Dist. LEXIS 53213, at *11-12 (citing Jackler, 658 F.3d at 241 ("In the context of the demands that Jackler retract his truthful statements and make statements that were false, we conclude that his refusals to accede to those demands constituted speech activity that was significantly different from the mere filing of his initial Report.")). As was the case in Matthews, the speech at issue in this case was

made pursuant to Plaintiff's job responsibilities, and the Second Circuit's opinion in Jackler is inapposite.

Plaintiff's citations to McAvey v. Orange-Ulter Boces, No. 07 Civ. 11181, 2009 WL 2744745 (S.D.N.Y. Aug. 28, 2009), Anderson v. State of New York Office of Court Admin., 614 F. Supp. 2d 404, 428 (S.D.N.Y. 2009) and Karl v. City of Mountlake Terrace, No. 11-35343, 2012 WL 1592181 (9th Cir. May 8, 2012) are also unavailing. In McAvey, at the motion to dismiss stage of the litigation, this Court held that "McAvey's official job duties cannot be said to include 'scrutinize[ing] her supervisors for fraud—essentially acting as a supervisor for her supervisors—let alone report[ing] them to external investigators.'" McAvey, 2009 WL 2744745, at *5 (quoting Rosenblatt v. City of New York, No. 05 Civ. 5521(GEL), 2007 WL 2197835, at *6 (S.D.N.Y. July 31, 2007)). However, at the summary judgment stage of the litigation, this Court noted that, while McAvey's FOIL request to the Goshen Police Department for a police report she filed concerning sexual abuse at her school constituted citizen speech, McAvey's "internal complaints to her supervisors and the BOCES Board are more akin to the speech in Weintraub and Garcetti and are not afforded First Amendment protection." McAvey v. Orange-Ulster BOCES, 805 F. Supp. 2d 30,

39 n.1 (S.D.N.Y. 2011). Unlike McAvey's FOIL request to the Goshen Police Department, which this Court described as "speech [] wholly distinct from the Plaintiff's job duties," Id. at 39, Plaintiff's complaints of an unconstitutional summons policy are consistent with his job duties as those duties are defined in Section 207-21 of the NYPD Patrol Guide and Judge Jones' opinion in Matthews.

Plaintiff's citation to Anderson v. State of New York, Office of Court Admin. is also unavailing, as the passage Plaintiff cites addresses whether the speech at issue regards matters of public concern. There is no dispute that Plaintiff's speech in this case concerns a matter of public concern; the issue is whether Plaintiff was speaking as a private citizen or in his official capacity as a police officer. In Anderson, the Court noted that the plaintiff's job duties did not include speaking out the improper practices about which the plaintiff complained. See Anderson, 614 F. Supp. 2d at 428 ("Speaking out about improper DDC practices was clearly not one of Anderson's job duties."). However, in this case, Plaintiff's job duties included speaking out about police misconduct.

In support of his motion to amend, Plaintiff also cites the recent Ninth Circuit decision in Karl v. City of Mountlake Terrace, No. 11-35343, 2012 WL 1592181 (9th Cir. May 8, 2012). The facts of Karl involved a civilian employee of the City of Mountlake Terrace Police Department who brought a § 1983 action against the City and its assistant police chief, alleging First Amendment retaliation. According to Plaintiff, in Karl, the Ninth Circuit held that the speech of an employee of the Mountlake Terrace Police Department did not "owe its existence" nor was it "commissioned or created" by her employer. Karl, 2012 WL 1592181, at *6 (citing Garcetti, 547 U.S. at 421-22). The Karl Court also held that "[t]he scope and content of a plaintiff's job responsibilities is a question of fact." Id. Notwithstanding the Ninth Circuit's opinion regarding a civilian employee of a Washington State police department, Judge Jones' recent opinion in Matthews, coupled with the NYPD Patrol Guide § 207-21, establish that an NYPD police officer's act of voicing "concerns about illegal policing practices are part-and-parcel of [the officer's] ability to properly execute his duties." Matthews, 2012 U.S. Dist. LEXIS 53213, at *7.

For these reasons, Plaintiff's motion to amend is granted in part and denied in part. Plaintiff is permitted to

substitute Lieutenant William Gough for Lieutenant Joseph Goff. However, because Plaintiff cannot establish that he spoke "as a citizen" rather than "as a government employee," Plaintiff's request to amend his complaint to include a First Amendment retaliation claim is denied.

**Councilman Vallone's Motion To Quash Is Denied**

Non-party Councilman Peter Vallone, Jr. has requested that the subpoena served upon him by Plaintiff be quashed. On April 17, 2012, the Corporation Counsel for the City of New York received a courtesy copy of a subpoena subsequently served on Councilman Vallone seeking the following documents:

> Any and all certified records of complaints received by Councilman Peter Vallone from his constituents and/or from any third parties, relating to the following subject matters: (i) Downgrading of Crime Reports by the NYPD; and (ii) Failure to Report Crime Reports by the NYPD;
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> Any and all certified copies of correspondence between Councilman Peter Vallone and Raymond Kelly and/or the NYPD relating to (i) Downgrading of Crime Reports by the NYPD; (ii) Failure to Report Crime Reports by the NYPD; (iii) the allegations of Adrian Schoolcraft.
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> Any and all certified copies of complaints from police officers and/or constituents regarding a quota policy by the NYPD regarding the number of arrests and/or summonses which must be issued by officers on a monthly basis.
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> Any and all certified copies of correspondence between

Councilman Vallone and the NYPD regarding allegations of an unlawful quota policy.

Any and all certified copies of correspondence between Councilman Vallone and Mayor Bloomberg regarding allegations of an unlawful quota policy by the NYPD and/or allegations of downgrading crime reports by the NYPD.

According to Councilman Vallone, because the information Plaintiff is seeking is outside the scope of Fed. R. Civ. P. 26, the subpoena should be quashed and the information sought therein denied. "A subpoena issued to a non-party pursuant to Rule 45 is subject to Rule 26(b)(1)'s overriding relevance requirement." Warnke v. CVS Corp., 265 F.R.D. 64, 66 (E.D.N.Y. 2010) (internal quotation marks and citations omitted). Councilman Vallone contends that the documents sought by Plaintiff concern whether there was a downgrading of crime reports, a failure to report crime reports and the existence of an unlawful quota policy. These issues, according to Councilman Vallone, are immaterial to the determination of whether Defendants in the present action entered Plaintiff's apartment unjustifiably on October 31, 2009 and thereafter unlawfully confined him at Jamaica Hospital. In subpoenaing complaints and correspondence relating to crime statistics manipulation and quotas, Councilman Vallone contends that Plaintiff is injecting extraneous issues into this litigation. Councilman Vallone also

contends that the subpoena should be quashed because the Councilman represents Astoria, Queens, which is within the confines of the 114th Precinct, and Plaintiff's allegations concern crime manipulation and quotas in the 81st Precinct in the Bedford Stuyvesant section of Brooklyn. Finally, Councilman Vallone objects to Plaintiff's request for "correspondence between Councilman Peter Vallone and Raymond Kelly and/or the NYPD relating to [] the allegations of Adrian Schoolcraft" on grounds that the request as stated is too vague and ambiguous to allow Councilman Vallone to respond.

Plaintiff opposes the motion to quash on grounds that (1) the City Defendants lack standing to quash the subpoena on behalf of non-party Councilman Vallone, (2) the items sought are directly relevant to the claims in the present action and (3) Councilman Vallone has made numerous public statements about having evidence in his possession which support Plaintiff's allegations.

With respect to Plaintiff's first argument concerning standing, Plaintiff notes that "[i]n the absence of a claim of privilege, a party usually does not have standing to object to a subpoena directed to a non party witness." Cole v. City of New

York, No. 10 Civ. 5308(BSJ)(KNF), 2011 WL 6057950, at *1 (S.D.N.Y. Dec. 5, 2011) (citing Langford v. Chrysler Motors Corp., 513 F.2d 1121, 1126 (2d Cir. 1975)). Plaintiff, however, bases his argument on the notion that the City Defendants are moving to quash the subpoena. Although the Corporation Counsel for the City of New York is representing the City Defendants, the May 11, 2012 letter requesting that the subpoena be quashed is written on behalf of non-party Councilman Vallone and not the City Defendants. The Cole v. City of New York case is instructive in this regard. Although the Magistrate Judge assigned to the case initially denied a motion to quash on the basis that the Defendants lacked standing to make a motion on behalf of non-parties, the District Judge ultimately found "that the motions to quash were made by the subpoenaed non-parties by counsel who also represent the defendants" and held that "the Magistrate Judge erred in denying the Defendants' motion exclusively on the basis of standing without a consideration of the merits." Cole, 2011 WL 6057950, at *1. Accordingly, because the motion to quash is made on behalf of Councilman Vallone and not the City Defendants, Plaintiff's argument that the City Defendants lack standing to bring the motion to quash fails.

Plaintiff contends that the items sought in the subpoena are directly relevant to the claims in this action. Under the Federal Rules of Civil Procedure, the scope of discovery extends to "any nonprivileged matter that is relevant to any party's claim or defense . . ." Fed. R. Civ. P. 26. The boundaries of Rule 26 have "been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). Plaintiff contends that the complaint expressly refers to the existence of the NYPD's unlawful quota policy and manipulation of crime statistics as the reason why Defendants took the actions the complaint alleges occurred on October 31, 2009. As such, the items sought in the subpoena to Councilman Vallone are directly relevant to the claims in this action. Plaintiff also notes that the City Defendants have served discovery demands related to the same items covered in the subpoena served on Councilman Vallone.

Plaintiff's third argument in opposing the motion to quash is that Councilman Vallone has made numerous public statements about evidence in his possession which support Plaintiff's allegations of an unlawful summons policy.

Newspaper articles submitted to the Court include statements by Councilman Vallone suggesting that the allegations of police misconduct alleged in the complaint are not limited the 81st Precinct. See Al Baker & William K. Rashbaum, New York City to Examine Reliability of Its Crime Reports, N.Y. Times, Jan. 5, 2011 ("'I believe that the statistics were in fact being manipulated,' Mr. Vallone said. 'I have spoken to many current and former police officers who unfortunately refused to go on the record but who have corroborated that fact. And I've spoken to many civilians whose valid complaints were not accepted by the Police Department.'"); Rocco Parascandola, Kelly Lays Down the Law to Cops, N.Y. Daily News, Jan. 21, 2012 ("Everything from, 'You have to go to the precinct to file a report,' to, 'We're not going to take a report because you didn't get a good look at the guy who robbed you,' Vallone said. 'It's happened far too often to attribute it to a few confused police officers.'"); Graham Rayman, NYPD's Reporting Problem: Reactions To Our 'NYPD Tapes' Confirmation Came Like A Swift Billy Club To the Skull, Village Voice, Mar. 14, 2012 ("'This report [the Quality Assurance Division investigation] might be a game changer,' [Councilman Vallone] says. 'This is even more evidence that the crime statistics are not accurate. It happens far too often for it to be just mistakes.' . . . 'Because of the

circumstances, the treatment of Schoolcraft should be looked at by the commission that Kelly established,' Vallone adds.").

Given these statements, Plaintiff contends that the subpoena served upon Councilman Vallone pertains to information relevant in this action.

"A subpoena that 'pursues material with little apparent or likely relevance to the subject matter,' . . . is likely to be quashed as unreasonable even where the burden of compliance would not be onerous," Kirschner v. Klemons, No. 99 Civ. 4828(RCC), 2005 WL 1214330, at *2 (S.D.N.Y. May 19, 2005) (quoting Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 50 (S.D.N.Y. 1996)), particularly where the person or entity on whom the demand is made is not a party to the action. See Copantitla v. Fiskardo Estiatorio, Inc., No. 09 Civ. 1608(RJH)(JCF), 2010 WL 1327921, at *10 (S.D.N.Y. Apr. 5, 2010); see also Fears v. Wilhelmina Model Agency, Inc., No. 02 Civ. 4911, 2004 WL 719185, at *1 (S.D.N.Y. Apr. 1, 2004) ("[T]he Court should be particularly sensitive to weighing the probative value of the information sought against the burden of production on the non party."). Councilman Vallone contends that that the requested records are only, at best, of doubtful or tangential relevance, and thus, the subpoena should be quashed since it is

beyond the scope of Fed. R. Civ. P. 26.

Notwithstanding Councilman Vallone's contentions, Plaintiff has established that his document requests are "relevant to any party's claim or defense," Fed. R. Civ. P. 26, and that his document requests relate to material that "bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." Oppenheimer Fund, 437 U.S. at 351. Rather than be of "doubtful and tangential relevance," Plaintiff's document requests relate to the essential question of the motive of the individuals who are alleged to have removed Plaintiff from his home on October 31, 2009 and subsequently confined him. As such, Councilman Vallone's request that the subpoena be quashed is denied.

With respect to Councilman Vallone's contention that the discovery requests are irrelevant because Councilman Vallone represents an area within the confines of the 114th Precinct rather than the 81st Precinct where Plaintiff was stationed, it must be noted that the allegations in the complaint are not limited to the 81st Precinct. Instead, Plaintiff alleges that the policy about which he complained affected the entire NYPD, and Councilman Vallone's statements to the press concerning this

policy suggest Councilman Vallone to be in possession of information related to that citywide policy. Councilman Vallone's contention that Plaintiff's request for "correspondence between Councilman Peter Vallone and Raymond Kelly and/or the NYPD relating to [] the allegations of Adrian Schoolcraft" is too vague and ambiguous is without merit, as Plaintiff's request describe the documents to be produced with sufficient particularity. The request identifies correspondence, the parties involved and the subject matter. To the extent any issues arise in the course of discovery, Plaintiff and Councilman Vallone shall resolve them via the meet-and-confer process or, if necessary, contact the Court for guidance.

**Conclusion**

For the reasons set forth above, Plaintiff's motion to amend his complaint is granted in part and denied in part, and non-party Councilman Vallone's motion to quash is denied.

It is so ordered.

**New York, NY**
**June 13, 2012**

**ROBERT W. SWEET**
**U.S.D.J.**